

ROBERT E. ORISKOVICH

IBLA 94-28

Decided December 6, 1993

Appeal from a letter-decision of the Needles Resource Area Manager denying a mining plan of operations for mining at the Moonstar Mine within the Table Mountain Wilderness Study Area. CA 32901.

Petition for stay denied; time to file supplemental statement of reasons granted.

1. Board of Land Appeals--Rules of Practice: Appeals: Stay

Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a notice of appeal is timely filed, but the petition for stay is filed after the expiration of the time period for filing an appeal, the petition is untimely and the decision becomes effective on the day after the expiration of the appeal period. However, nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board of Land Appeals, in its discretion, may entertain such a petition.

2. Mining Claims: Plan of Operations--Rules of Practice: Appeals: Stay

A petition for stay of a decision denying a mining plan of operations in a wilderness study area, if granted, would not authorize the activities set forth in that plan. The granting of a stay would merely mean that the denial would not be effective during the pendency of the stay; it would not constitute approval of the pending plan of operations.

APPEARANCES: Susan N. Wasko, Esq., Las Vegas, Nevada, and Jack M. K. Gonzales, Esq., Honolulu, Hawaii, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

By letter-decision dated September 8, 1993, the Needles Resource Area Manager denied the mining plan of operations filed on August 9, 1993, by Robert E. Oriskovich for the Moonstar Mine (CA 32901). The reason for

the denial was that the plan proposed "surface-disturbing activities which would be impairing to wilderness values within the Table Mountain Wilderness Study Area." By letter dated September 10, 1993, the Area Manager informed Oriskovich of the procedure in 43 CFR 4.21(a) for filing a petition for stay, emphasizing the requirement that the petition be filed together with a timely notice of appeal.

On October 8, 1993, an attorney representing Oriskovich filed an appeal of the September 8th letter-decision. No petition for stay accompanied the notice of appeal.

On November 8, 1993, this Board received a document from another attorney representing Oriskovich. That document is styled "Petition for Stay of Adverse Action: Statement of Reasons; Request for Extension of Time to File More Definite Statement."

[1] Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. In this case, the petition for stay was not filed at the same time as the notice of appeal. Nor was it received during the appeal period. Thus, the petition for stay was not filed together with the notice of appeal within the meaning of 43 CFR 4.21(a)(2). ^{1/} Since, the petition was untimely under 43 CFR 4.21(a)(2), the decision became effective on the day following the expiration of the appeal period. However, although the regulations establish a particular time period for filing a petition for stay in order to delay a decision becoming effective, the failure to file a petition within that time period means only that the decision becomes effective. Nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board, in its discretion, may entertain such a petition.

[2] Nevertheless, even a timely petition for stay would have been of little consequence under the circumstances of this case. BLM issued the decision in this case pursuant to the regulations in 43 CFR Subpart 3802 governing mining operations in wilderness study areas. ^{2/} Where BLM denies

^{1/} In Fresna Construction Co. v. OSM, 101 IBLA 229 (1988), the Board held the requirement of 43 CFR 4.1152(b) mandating that a petition for review of a proposed assessment of a surface mining civil penalty be "accompanied by" prepayment of that penalty would be satisfied where prepayment was received any time during the period for filing a petition. There is no reason to interpret the requirement of 43 CFR 4.21(a)(2) (58 FR 4942-43 (Jan. 19, 1993)), that the petition for stay be filed "together with" the notice of appeal more restrictively. Accordingly, a petition for stay will be considered to be filed "together with" the notice of appeal, if it is received, in accordance with 43 CFR 4.411(a), any time during the time period for filing the notice of appeal.

^{2/} Under 43 CFR 3802.5(a), the decision of the authorized officer is appealable to this Board in accordance with the regulations in 43 CFR Part 4. The stay regulation, 43 CFR 4.21 (58 FR 4941 (Jan. 19, 1993)), is included in that part.

a proposed plan for operations in a wilderness study area, a request for a stay, even if granted, would not authorize the action which BLM has denied. The granting of a stay would merely mean that the decision denying the plan of operations would not be effective during this Board's review of the decision. It would not constitute approval of the pending plan of operations, nor would it authorize any activities under the plan.

In any event, the reasons set forth by appellant in his November 8, 1993, filing provide no basis for directing a stay of the denial of the plan, which at this time is effective. The petition for stay is denied.

Appellant also seeks time to file additional reasons in support of his appeal. He does not, however, indicate how much time he desires. We will grant 30 days from receipt of this decision to make such a filing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is denied; appellant is granted 30 days from receipt of this decision to file a supplemental statement of reasons; and BLM is granted 30 days from receipt of a copy of that supplemental statement of reasons or 60 days from receipt of this decision, whichever is later, to file an answer in this case.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge